No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY (a minor), BEATRICE GAY (a minor), SONNY JAMES MOKULEIA GAY (a minor), MICHAEL VANATTA K. GAY (a minor), LLEWELLYN NAPELA GAY (a minor), ALBERT GAY HARRIS (a minor), WALTER WILLIAM HOLT (a minor), ALICE K. HOLT (a minor), and ETHEL FRIDA HOLT (a minor), by HARRY EDMONDSON, their guardian ad litem,

Appellants,

vs.

H. FOCKE and H. M. VON HOLT, trustees under the will of the estate of JAMES GAY, deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

HENRY HOLMES,
H. EDMONDSON,
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Attorneys for Appellants.

FILED
AUG 6 1903
F. D. MONCKTON

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With the permission of counsel we briefly discuss the phase of the case which has arisen by reason of an amendment to the record. In the transcript of record as originally filed it was stated (pp. 123-4)

that the subleases were for "the remainder of the term of the head lease".

The amendment consists in bringing before this court copies of the head lease and of the subleases from which it appears that the head lease was for the term of fifty years from the first day of May, 1884, or in other words it will terminate on April 29, 1934. The subleases, of which the one dated July 2, 1902, may be taken as an example, are for the term of thirty-five years, seven months and five days from September 15, 1898, or in other words they will expire on April 20, 1934, so that there will remain a difference of nine days between the full term of the head lease and the term of the subleases.

While it appears from the bill of particulars presented with the amendment that these exhibits were filed in the trial court, it does not appear that they were a part of the record on appeal to the Supreme Court of the Territory, and strictly speaking we take it that this court may now consider only the record on appeal below. However, this is, from our standpoint, immaterial, since we urge that the amendment does not overcome the argument advanced in Subdivision IV of our reply brief. To the contrary the fact that this difference in the terms of the respective leases is the *only* answer made reinforces our position to the effect that when the trustees ceased to carry on the business of ranching and stockraising at Mokuleia, dis-

posed of the live stock and movable assets, and made the subleases for terms which were for all practical purposes, the full term of the head lease, that from that time forward at least and at the latest, this particular property of the testator was *converted* and the obligation of the trustees to reinvest the proceeds for the benefit of the remaindermen as well as for the life tenants, became obvious.

These subleases were not planting or crop contracts such as were considered by this court in

O'Brien v. Webb, 279 Fed. 117 (California Alien Law Decision).

To the contrary they are formal documents demising "all that certain land situate at Mokuleia, etc., bounded and described as follows" (here follows description by metes and bounds). Thus they are grants of the *land* itself and not of the right to the crops to be grown thereon.

The authorities cited by counsel on this point involved the consideration of a question arising between a landlord and his tenant as to whether or not the defendant as lessee was directly liable to an owner for his rental. No such question is here involved since this is not an action between the owner or the original lessee and the sublessees, and none of them are parties to this suit. The court is here concerned only with the question of the proper disposition of funds collected by trustees to the beneficiaries thereof of such funds, and whether or

not these contracts are strictly and technically assignments of the head lease or subleases is quite immaterial if, for all purposes *as concerns the beneficiaries,* they effect a *re-investment* of the property in question.

The rental stipulated in the subleases was

> "as an *annual* rental the gross value of one-twentieth of all sugar or other products grown or produced upon said premises in each year during said term."

The payments of the rental were to be made during the months of July and December of each year. The last payment under the subleases must, therefore, be made in December, 1933, as the semi-annual payment on the crop for the current year and this amount will be precisely the same whether the sublease expires on April 20th or April 30th, 1934. This difference, therefore of time will not change the *trust fund* by a farthing. The beneficiaries, whether they be life tenants or remaindermen, will receive precisely the same amount of money which ever date is selected.

Since, therefore, the rights of the parties here must remain the same the alleged distinction is of no importance whatever since the law must regard the substance and not the form.

> "The Courts will look through form to substance."
>
> *Safe Deposit & Trust Co. v. Miles,* 273 Fed. 822;
>
> *Eisner v. Macomber,* 252 U. S. 189 at p. 211.

It is submitted, therefore, that this change in the record in no wise controverts our position as to the duty of the trustees when they elected to go out of the ranching and stockraising business and make these subleases. From the standpoint of the will and the trust there created, the trustees, when they made the subleases, changed the character of the business and of the property. They did *in fact convert* what was previously an investment in a ranching and stockraising business to an entirely different character of investment. It was their duty to see that the income resulting from such new investment so converted be made in such method as to comply with the expressed wish of the testator to the end that the money realized "would inure to the benefit of or increase the trust *estate* created under this will".

We shall not burden the court with a re-statement of the other questions in the case, some of which are again discussed in the reply briefs for the life tenants and the trustees.

Dated, San Francisco,
August 6, 1923.

Respectfully submitted,
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